In the District Court of the United States for the Eastern District of New York

CIVIL ACTION NO. 7106

MURRAY MESTER AND MEYER MESTER, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, RICHARD E. O'DEA, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States of America and Federal Communications Commission, pursuant to Rule 12, paragraph 3, move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment, dated March 27, 1947, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47) as extended by Section 402 (a) of the Communications Act of 1934 (47 U. S. C. 402 (a)), granting the motion of the defendant-appellees, United States of America and Federal Communications Commission, for summary judgment dismissing the complaint of plaintiff-appel-

lants, Murray Mester and Meyer Mester, to set aside an order of the Federal Communications Commission. The Commission's decision, on March 4, 1946, refused consent to the transfer of control of Wodaam Corporation, licensee of radio station WOV, New York City, New York, from defendant-appellees Arde Bulova and Harry D. Henshel, to plaintiff-appellants, Murray and Meyer Mester. Application for the consent of the Commission was made pursuant to the provisions of Section 310 (b) of the Communications Act of 1934, as amended (47 U. S. C. 310 (b)).[1]

The court entered a written opinion together with findings of fact and conclusions of law on February 4, 1947. Thereafter, the court entered a final judgment granting the motion of defendant-appellees, United States of America and Federal Communications Commission, for summary judgment dismissing the complaint, on March 27, 1947. An appeal was allowed on May 25, 1947, and personal service of the appeal papers was made upon defendant-appellees on May 27, 1947.

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[1] This section provides:

"The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission, shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

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The pertinent facts, as they appear from the decision of the Commission and the decision of the court, are as follows:

On February 8, 1944, plaintiffs and defendants Bulova and Henshel filed with the Commission an application for the transfer of control of Wodaam Corporation to be effected by the sale of Bulova and Henshel's stock interests in that corporation to the plaintiffs pursuant to contracts between the parties. On May 9, 1944, the Commission designated the application for hearing on issues set out in the notice of designation for hearing released on May 27, 1944. Among the issues specified in the notice of designation for hearing was the following:

> 1. To obtain full information with reference to the qualifications of the proposed transferees.

The hearing was held on July 6 and 7, 1944, before Commissioner C. J. Durr. Testimony on behalf of the transferees was given principally by Murray Mester.

At the hearing, Murray Mester was examined concerning difficulties with federal and state regulatory agencies in which he and the Balbo Oil Company, owned by his brother, Meyer Mester, and himself, were involved. From exhibits offered in evidence and from Murray Mester's testimony, it appeared that between 1933 and 1944, there were five condemnations by federal food and drug authorities because of misbranding

and mislabelling involving products shipped by Murray Mester individually, and products packed and shipped by the partnership; two cases involving condemnation of a shipment in the state of Connecticut by federal and state authorities because of shortages in volume; a stipulation entered into with the Federal Trade Commission to cease and desist from making certain representations in the advertising of their product; and a suit brought by the O. P. A. alleging sale of oil at over ceiling prices, and failure to keep required records, which was settled by the payment of about $3700. In the case of one of the judgments of condemnation involving a product called "La Deligiosa" Oil, Murray Mester gave testimony which conveyed the impression that he was not at all involved in that matter. And on the basis of that testimony, the notice of judgment which had been offered in evidence was withdrawn. Subsequent cross-examination, however, disclosed that the judgment did relate to a product which he had shipped. In context, the testimony reveals that the initial failure to identify the judgment was not the result of inadvertence or a lapse of memory, but was rather a calculated attempt to mislead the Commission.

After submission of proposed findings of fact and conclusions, the Commission issued its proposed decision on March 28, 1945. Exceptions were filed by the transferees, and oral argument was held before the Commission on July 25, 1945.

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On March 4, 1946, the Commission adopted its final decision denying its consent to the proposed transfer of control. On the basis of the evidence presented at the hearing, the Commission made findings of fact from which it concluded that the plaintiffs have no adequate conception of the public responsibilities of a station licensee which they are seeking to assume; that at the hearing the transferees revealed an extreme lack of candor in testifying under oath as to their numerous difficulties with various governmental bodies; and that the transferees in the conduct of their business have violated and disregarded applicable laws of the States and of the Federal Government. The Commission therefore concluded that the transfer of control of plaintiffs would not serve the public interest, convenience, or necessity since the transferees have not established adequate technical, character, and other qualifications to convince the Commission that they are capable of being entrusted with the duties and privileges inherent in a radio station license.

The district court held that the Commission's findings that the transferees were not possessed of a sense of public responsibility and that the testimony concerning their difficulties with governmental agencies revealed an extreme lack of candor were supported by substantial evidence, and afforded an ample basis for the Commission's conclusion that approval of the transfer of control to plaintiffs would not serve the public

interest.[2] The court held that the character qualification prescribed in Section 308 (b) of the Communications Act (47 U. S. C. 308 (b)) reasonably includes "involvement in the litigation proved against the plaintiffs and their disposition not to be ingenuous and truthful concerning it"; and that the Commission may take such matters into consideration in passing on the qualifications of a proposed transferee when they are disclosed at a hearing, even though no questions concerning them appear in the application forms.

Appellants contend that the conclusions of the Commission relating to their want of candor in testifying, and their lack of a sense of public responsibility in the conduct of their edible oil business, as manifested by their record of civil litigation, are not supported by substantial evidence, and are arbitrary and capricious. These contentions have, however, been fully considered by the Court below, and it is manifest from the Court's decision, the Commission's decision and

[2] The three judges of the statutory court agreed that the want of the requisite character qualifications provided a sufficient basis for the Commission's conclusion. The late Judge Moscowitz and Judge Galston held that the Commission's finding that the plaintiff's did not possess the requisite technical qualifications was unsupported, but observed in the opinion of the court that "The third reason advanced by the Commission is not important in view of the disposition made herein concerning the other two * * *." Circuit Judge Frank was of the view that this conclusion was supported by the evidence, but otherwise agreed with the decision of the court, rendered by the late Judge Moscowitz.

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the record of the hearing on which it was based that no substantial reason exists for reexamining the judgment of the court below.

Appellants urge that the Commission did not find that appellants misrepresented and concealed facts, but found only an extreme lack of candor. The Commission's findings and the supporting evidence, however, make it clear that Murray Mester, in testifying for appellants attempted to mislead and create a false impression. That he ultimately did not succeed does not detract from a finding that the "willingness to deceive" was manifested. And the decision of this Court in *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, leaves no doubt that the failure of an effort to deceive cannot detract from a finding of want of character qualifications when the disposition to deceive is clearly manifested.

Appellants also urge that there is no evidence in the record to support this finding as to Meyer Mester. No substantial issue is raised by this contention. It clearly appears from the record and the Commission's findings that Murray and Meyer Mester, who were co-partners in the oil business, were applying for consent for the proposed transfer as co-partners. Murray Mester was the principal witness in behalf of the transferees, as the record clearly reveals. And it is not the case, as appellants assert, that Meyer Mester was not examined at all concerning "their

numerous difficulties with various governmental bodies." For on cross-examination, Meyer Mester's attention was called to Murray Mester's testimony concerning these matters, and he was asked whether he could recall any other violations besides those mentioned, and he stated that he could not. He was also asked whether during that time he was interested in the companies involved, Modern Packing Company and Balbo Oil Company, and he stated that he had been since June or July of 1933. Since it is clear from the Commission's decision that the conclusions as to candor and reliability are based on Murray Mester's testimony, and that these conclusions are made as to the proposed transferees as a partnership, under these circumstances the want of additional qualifying language to make these facts clearer certainly does not vitiate the Commission's decision.

Appellants also urge that there is no substantial evidence to support the Commission's conclusion that "The transferees, in carrying on their edible oil business have violated and disregarded the regulatory laws of the states and the federal government. * * * The violations have been numerous and extended over their entire business career. * * * Many of these violations were clearly not matters of inadvertence." In this connection appellants appear to make two arguments: that in the light of the volume of business conducted and the time period involved,

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the violations were not numerous; and that the Commission failed to make any finding that the violations were wilful. But nine cases of law violations, eight of which involve misrepresentations of various sorts, are certainly sufficient in a proceeding relating to appellants' character.

The second argument is that a finding of want of requisite character qualification cannot reasonably be based on a record of civil litigation where sanctions may be applied without establishing intent or wilfulness. Thus, the conclusion is invited that only criminal convictions may reasonably afford a basis for a finding of the want of requisite character qualification. The District Court fully considered this contention and reached a conclusion that character qualification is not limited to questions concerning prior criminal convictions but may also reasonably extend to involvement in civil litigation of the type presented in this case. The decision of this Court in the case of *Ma-King Products Co.* v. *Blair,* 271 U. S. 479, lends support to the conclusion that a finding of the want of requisite character qualifications may be reasonably based on matters other than convictions of crime. It may be noted that the Commission did not rely upon the bare record of the judgments and stipulation alone. For appellants were afforded an ample opportunity at the hearing to explain the nature of the matters leading to the judgments and the stipulation, and to afford an explanation. And

their testimony lends support to the Commission's conclusion that many of the violations were clearly not matters of inadvertence.

Appellants also contend that the Commission has not applied the same standard of disregard of regulatory laws in other cases. However, as the decision of this Court in the case of *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, makes clear, the question to be determined on the appeal is whether the Commission acted within its statutory authority and whether substantial evidence exists to support its conclusion. Whether or not the Commission should have denied consent in other cases where it granted it is not a question which this Court is in a position to dispose of on this appeal.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

GEORGE T. WASHINGTON,
Acting Solicitor General.
BENEDICT P. COTTON,
General Counsel,
Federal Communications Commission.

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